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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945

No. 268

MARTIN LEITHAUSER, ADMINISTRATOR OF THE ESTATE OF P. J. LEITHAUSER, DECEASED,

Petitioner,

—*vs.*—

HARTFORD FIRE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

EUGENE RHEINFRANK,
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New York, N. Y.

JUDGE C. W. PALMER,
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Counsel for Petitioner.

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HARTFORD FIRE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matters Involved.

The petition of P. J. Leithauser respectfully shows to this Honorable Court as follows:

Suit was brought on a fire insurance policy which insured in the sum of $10,000.00 a grain elevator building, machinery and equipment belonging to plaintiff, located at Sherwood in Defiance County, Ohio. Fire totally destroyed this property on July 20, 1930. On July 24, 1930, the insurer and insured agreed that the sound value of the property just prior to its loss was $14,944.80. The policy con-

tained, among its many finely-printed defeasance conditions the provision that it was to be void (quoting), "if the subject of insurance be personal property and be or become incumbered by a chattel mortgage". Although the elevator building was real estate, the plaintiff had, prior to the issue of the policy on January 28, 1930, executed a chattel mortgage upon it which was unreleased of record at the time of the fire. The Circuit Court of Appeals affirmed the judgment of the district court which was that the existence of the chattel mortgage constituted a violation of the above-quoted provision in the policy and that by reason thereof the plaintiff was not entitled to recover for the loss. The insured relied upon Section 9583 of the General Code of Ohio, which was the Valued-policy statute of that State. This statute eliminated all defenses in suits to recover the full amount on fire insurance policies except the defense of intentional fraud and the defense that there had been a change that increased the risk. The insured contended and still contends that this statute barred the respondent from making the defense that the alleged chattel mortgage existed against the property at the time the policy was issued.

The Circuit Court of Appeals rendered its judgment and opinion on April 30, 1945 (Rec. 527). The *Opinion* is brief and we will quote it in full:

> "This case came on to be heard upon the record, briefs and oral argument of counsel. And it appearing that without the knowledge of the insurer and in violation of the terms of the policy, a chattel mortgage existed upon the insured property at the time the policy was issued and at the time of the fire; and it appearing that Section 9583, General Code of Ohio, does not preclude the assertion of the appellee of the defense that a chattel mortgage was outstanding on the insured structure; *Sun Fire Office of London* v. *Clark,* 53 O. S.

414; *Webster* v. *Dwelling House Ins. Co.*, 53 O. S. 558; *Germania Fire Ins. Co.* v. *Werner*, 76 O. S. 543. It is ordered that the judgment be, and it hereby is, affirmed. Filed April 30, 1945."

This is the third time *certiorari* proceedings have been filed in the Supreme Court in this cause. Unless this Honorable Court grants this petition for a writ of *certiorari* a grave injustice will be done.

Contentions of Parties.

The Petitioner contended that the Respondent, having neither pleaded nor proven that the insured had been guilty of intentional fraud or that there had been any change that increased the risk, could not lawfully assert the defense that the existence of the chattel mortgage constituted a violation of the policy, and he urged that Section 9583, General Code of Ohio, prohibited the making of such a defense, in the absence of intentional fraud or some change that increased the risk.

The respondent contended that the chattel-mortgage defense was not barred by the terms of Section 9583 of the General Code of Ohio; that said statute did not destroy the validity or effectiveness of the provision which rendered the policy void if the subject of the insurance be personal property and be or become encumbered by a chattel mortgage; that the subject of the insurance was personal property; that the case at bar was governed by the opinions and decisions in the three cases cited in the opinion of the Circuit Court of Appeals.

The petitioner contends that not one of said three cases cited by the Circuit Court of Appeals supports or justifies the judgment or final order rendered by that Court; that the interpretations placed by the appellate court upon the

decisions in those three cases and upon Section 9583, General Code of Ohio, are contrary to and inconsistent with the weight of judicial authority in Ohio; that the Circuit Court of Appeals erroneously disregarded or did not give proper consideration to a number of decisions and opinions rendered by the Supreme Court of Ohio in which that Court interpreted Section 9583, General Code, in a manner contrary to the opinion and order hereinbefore quoted, and held that a policy could not be annulled or considered breached in Ohio because of the existence of a mortgage or incumbrance upon the building or structure that was insured; that the people of Ohio and of other States which have enacted a Valued-policy statute are in dire need of that full protection of their rights against insurance companies which only the Supreme Court of the United States has thus far been giving them.

Reasons for Allowance of Writ.

1. The Circuit Court of Appeals has erroneously decided an important question of local law in a way that is in conflict with the settled decisions of the Supreme Court of Ohio.

2. The Circuit Court of Appeals has decided an important question of general law and of general and great public interest in a way that is untenable and contrary to the public will as expressed by legislative enactment in Ohio and in the Valued-policy statutes of other States of the United States in holding that Section 9583 of the General Code of Ohio does not bar the making of the defense that the policy is void because a mortgage existed against the insured property at the time the policy was issued, even though there was no change increasing the risk and even though there was no intentional fraud on the part of the policy-holder that was pleaded or proven.

Prayer.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled *Martin Leithauser, Administrator of the Estate of P. J. Leithauser, deceased, Petitioner* v. *Hartford Fire Insurance Company, Respondent,* No. 9937, to the end that the said case may be reviewed and determined by this court as provided in Judicial Code, Title 28, Sec. 347, or that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

MARTIN LEITHAUSER, Administrator of the Estate of P. J. LEITHAUSER, deceased,

Petitioner,

By EUGENE RHEINFRANK,
C. W. PALMER,
FRAZIER REAMS,
GEORGE C. SPRAGUE,

Counsel for Petitioner.